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WE'RE TALKING ABOUT PRACTICE: IN DEFENSE OF THE GAMES PLAYED METHOD OF APPORTIONMENT AND OTHER STATUTES AIMED AT ATHLETES

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I. INTRODUCTION

America has always been fascinated by sports, and perhaps no more so than now. As sports have become increasingly popular, profitability has increased as well—evident by the rise in player salaries, multi-million dollar sponsorships, and naming rights—all of which have led to increased valuations for sports franchises.[1] Accordingly, cities, counties, and states have been increasingly attracted to the economic, urban development, and symbolic benefits a sports franchise can bring to a region.[2] However, because of the monopoly power that exists in the major sports leagues—the MLB, NFL, NBA, NHL, and MLS—although demand for sports is on the rise, supply remains stagnant. The question remains: how are cities supposed to attract major sports franchises to their areas?

Enter the concept of the public/private partnership. In exchange for benefits accompanying the establishment of a local sports franchise in a city, county, or state, these municipalities will finance a large portion of sports complexes from public funds. These deals are seemingly beneficial for both parties, as long as the costs do not outweigh the benefits. Unfortunately, the costs associated with publicly financed partnerships are typically downplayed to the public. The cost of building the structure is often visible to the public eye and represents a large cost,[3] but the costs associated with the land and infrastructure, and the ongoing costs of operations, capital improvement, municipal services, and foregone property taxes, are also significant and often overlooked.[4] The costs of stadiums have increased over the last decade, as well as the public share of the cost.[5] Because the public is taking on a larger burden of the stadium cost and deals are being structured without analyzing the full cost to the public for the construction of a stadium, the

1. JUDITH GRANT LONG, PUBLIC/ PRIVATE PARTNERSHIPS FOR MAJOR LEAGUE SPORTS FACILITIES 5 (2013).

2. *Id.* at 7.

3. The cost of a stadium on its own is large; the average NFL stadium costs $488 million, of which eighty-seven percent is paid by the public partner. *Id.* at 84.

4. "Based on an analysis of all 121 sports facilities in use during the 2010 season for MLB, NFL, NBA, NHL, and MLS, the result of adjusting for these omissions is to increase the average public cost by $89 million per facility to a total of $259 million . . . ." *Id.* at 80.

5. *See id.* at 88-92.

revenue recovered by the public is often less than the cost of building it.[6] If a state or locality cannot recover the cost of a stadium from the revenue generated by the stadium, is it rational to tax the players that directly benefit from the construction of these cathedrals of the game?

Two issues were brought before the Ohio Supreme Court in two cases that seek to answer this question. Specifically, these cases concerned the state and local taxation issues associated with two nonresident professional football players, Hunter Hillenmeyer and Jeff Saturday, for their involvement in games played outside of their teams' respective home states. Both players argued that states and localities do not have constitutional authority to tax nonresident athletes by apportioning their income on a "games played method" of taxation. This method divvies up personal income to a state in proportion to the ratio of games played by a player within that state divided by the total amount of games played. By contrast, the two players argued for a "duty days" method of apportionment, which would apportion the taxpayer's personal income to the state in proportion to the amount of days the players were contractually obligated to perform in a state (duty days) by the total amount of duty days in the year. The players argued that the games played method of apportionment violates the Due Process Clause and Commerce Clause of the United States Constitution. Additionally, players also challenged state statutes that distinguish athletes and entertainers from all other taxpayers, arguing that such statutes violate the Equal Protection Clause of the United States Constitution.[7]

This Comment seeks to examine the issues raised by the Hillenmeyer and Saturday cases. To properly analyze these issues, it is important to first determine whether states and localities have the power to tax personal income, and how the Constitution restricts state and locality taxing powers. Part II of this Comment discusses the power of state and local taxation, and Part III discusses the restrictions on state and local taxation. Part IV describes the apportionment of taxation on professional athletes' salaries, including an overview of how state and federal courts have analyzed this issue, as well as Federal Tax Administration recommendations. Part V highlights the cases decided by the Ohio Supreme Court. These cases clearly lay out the arguments from both sides on the issue of apportionment and the issue of statutory discrimination. Part VI argues why the games played method of apportionment is Constitutional while Part VII analyzes why state and local statutes that single out professional athletes and entertainers are Constitutional. Finally, Part VIII concludes with a recap of the issues

6. *Id.* at 13-14.

7. Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164 (Ohio 2015); Saturday v. Cleveland Bd. of Review, 33 N.E.3d 46 (Ohio 2015).

involved, and how legislatures should, and courts must, proceed in the future.

II. THE POWER OF STATE AND LOCAL TAXATION

The question of whether state governments have the power of taxation begins with the determination of whether a taxpayer falls within the state's jurisdiction.[8] The jurisdiction of state taxation can come from either the domicile of the taxpayer or the location of the source of income.[9] A state has the authority to tax a resident of that state on income from whatever source derived, regardless of whether the income was derived from within the state.[10] This power to tax residents was established in *Cohn v. Graves*, where the United States Supreme Court decided that state taxation of its residents is "universally recognized" and that residence alone is sufficient for taxation of the resident's entire income.[11]

States may also tax nonresidents on income derived within the state. In 1920, the Supreme Court upheld state personal income taxation on nonresidents in *Shaffer v. Carter*.[12] There, the Court upheld a state tax by Oklahoma levied on income derived from oil and gas producing properties in the state.[13] This tax covered residents and nonresidents alike.[14] The Court held, like income from residents, income of nonresidents derived within the taxing state is appropriate to tax and the state may "levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the State, or their occupations carried on therein."[15] But unlike the all-encompassing taxation on income of residents, the taxation on nonresidents is limited. Where the jurisdiction to taxation of residents extends to all income, the jurisdiction of nonresident income "extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."[16]

In a companion case to *Shaffer*, the Court also upheld a New York tax

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8. 1-9 BENDER'S STATE TAXATION: PRINCIPLES AND PRACTICE § 9.14 (Charles W. Swenson ed., Matthew Bender 2009).

9. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462-63 (1995); Shaffer v. Carter, 252 U.S. 37 (1920).

10. Cohn v. Graves, 300 U.S. 308 (1937).

11. *Id.* at 313-15.

12. 252 U.S. 37 (1920).

13. *Id.* at 45.

14. *Id.* at 52.

15. *Id.*

16. *Id.* at 57.

on nonresident employees working in New York.[17] The Court held that states have "complete dominion over all persons, property, and business transactions within their borders" except when restricted by the Constitution.[18] This power is justified because the states "assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses."[19]

Localities also have looked to personal income tax to raise funds for local governments.[20] Localities derive their power to tax from the state's power.[21] A state can delegate a locality to impose any tax that a state may impose, so long as it does not violate uniformity or impermissibly discriminate.[22] Although there are fewer states that allow localities to impose income tax on both residents and nonresidents than states that levy a personal income tax, the number has increased over time, attributable to recurring urban fiscal crises.[23] Philadelphia was the first locality to impose a personal income tax in 1938, and now, fourteen states and over 4,000 localities have levied local income taxes.[24] For example, cities such as Cincinnati, Columbus, Detroit, Kansas City, Philadelphia, Pittsburgh, St. Louis, and San Francisco all currently impose a local income tax.[25]

III. RESTRICTIONS ON STATE AND LOCAL TAXATION

Although the Supreme Court has granted states the ability to tax, that ability is limited insofar as that taxation may not violate the United States Constitution. The three main restrictions of the Constitution that limit the taxing powers of the states are the Due Process Clause of the Fourteenth Amendment, the Commerce Clause, and the Equal Protection Clause. States cannot tax those who are not under their jurisdiction. There are separate tests for jurisdiction under both the Due Process and Commerce Clauses.

The arguments that are brought against the games played method of personal income apportionment are that it violates the Due Process and

17. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

18. *Shaffer*, 252 U.S. at 50.

19. *Id.*

20. 2-29 BENDER'S STATE TAXATION, *supra* note 8, at § 29.04.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. 2-29 BENDER'S STATE TAXATION, *supra* note 8, at § 29.02.

Commerce Clauses of the Constitution. It has also been argued that the state and local statutes that single out professional athletes and entertainers violate the Equal Protection Clause of the Constitution. Before arguing this claim, it is important to first understand the regulations that are placed on state and municipal governments by the Constitution.

A. Due Process Clause

The Due Process Clause of the Fourteenth Amendment states that no state shall, "deprive any person of life, liberty, or property, without due process of law . . . ."[26] A state tax is a deprivation of the taxpayer's property and therefore must be levied in accordance with the Due Process Clause. For a state to establish due process, there must be a connection between the taxpayer and the state. The taxpayer must have, "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[27] The Supreme Court has gone on to state "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State."[28] Furthermore, in *International Harvester Co. v. Wisconsin Department of Transportation*, the Supreme Court explained that "[a] state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions [] occurring there[.]"[29]

Not only must the state establish that a taxpayer has minimum contacts in the state, but the tax must also be rationally apportioned to the activity in the state. A state tax on a nonresident that is not rationally apportioned to the services provided by the state is a violation of the Due Process Clause. The Supreme Court has ruled that the taxpayer holds the burden of proof to show that a tax is unfairly apportioned, stating "when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases."[30]

Because multiple states can tax one person on the basis of both source and residence, taxpayers may be subject to double taxation or taxation from multiple states from the same source of income. The Supreme Court has held that such double taxation by multiple states does not, by

26. U.S. CONST. amend. XIV, § 1.
27. Miller Bros. Co. v. Md., 347 U.S. 340, 344-45 (1954).
28. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978).
29. 322 U.S. 435, 441-42 (1944).
30. Hans Rees' Sons, Inc. v. N.C. *ex rel* Maxwell, 283 U.S. 123, 133 (1931).

itself, violate the Due Process Clause.[31] Additionally, it is not a violation of the Due Process Clause for multiple states to enforce a tax for the same source of income. However, to avoid the issue of double taxation on personal income, many states provide credits to their residents on the taxes paid to other states.[32]

A taxpayer might also be liable to double taxation if two states have different source rule definitions.[33] The Due Process Clause will not limit states from adopting their own source rules, as long as the taxpayer has *minimum contacts* with that state and the income attributed to the state is rationally related. Although states with different source rules might create double taxation, this double taxation does not violate the Due Process Clause.[34]

B. Commerce Clause

The Supreme Court has held, even if a state tax passes the "minimum contacts" requirement of the Due Process Clause, this does not necessarily mean that the Commerce Clause requirement has been passed.[35] In *Quill Corporation v. North Dakota*, the issue before the Court was the collection of a use tax on a nonresident corporation.[36] Although the corporation had personally availed itself to the state under notice and fundamental fairness, the Court held it would not obliterate the sharp distinction that the Court had previously made between "minimum contacts" for the due process clause and "substantial nexus" for the Commerce Clause.[37]

The Commerce Clause gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[38] The Court has interpreted the dormant power of the Commerce Clause to mean that, not only is regulation of interstate commerce a federal power, but this federal power prohibits states from

31. *See* Curry v. McCanless, 307 U.S. 357, 367-68 (1939); Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938).

32. WALTER HELLERSTEIN, STATE AND LOCAL TAXATION 386 (9th ed. 2009). A credit is a dollar for dollar tax forgiveness against taxes owed to a state. For example, if a taxpayer was a resident of state A, and owed $500 to state A for personal income, then the taxpayer would be liable for $500 to state A. But if the taxpayer was also taxed $400 on the same income by state B, the taxpayer would have a $400 credit against the $500 taxes liable to state A, and would therefore only be liable for $100 on taxes for state A.

33. *Id.* at 427-28.

34. *Id.* at 388.

35. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

36. *Id.* at 302.

37. *Id.* at 311.

38. U.S. CONST. art. 1, § 8, cl. 3.

exerting the same power.[39] Therefore, states are prohibited from exerting power that would unduly burden interstate commerce. A tax that would unduly burden interstate commerce would fall under the dormant power of the Commerce Clause and would be unconstitutional.

The current test for sustaining a state tax under the Commerce Clause was presented by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*.[40] In *Complete Auto*, a Michigan corporation challenged the constitutionality of a Mississippi tax under the Commerce Clause. The tax levied against the corporation was for activity performed solely in Mississippi.[41] The corporation was taxed for its conduct in shipping goods from two points within the state.[42] The Court directly overruled the per se rule of limiting taxation on interstate commerce and held that the Mississippi tax did not violate the Due Process or the Commerce Clause.[43] Along with a Due Process analysis, the Court provided a four-pronged test to determine if a tax could be sustained under the Commerce Clause. For a state tax to be in compliance with the Commerce Clause, the tax must: (1) apply to an activity with substantial nexus to the state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state.[44]

With regard to the first prong, the Court has held that the substantial nexus requirement is a different standard than the minimum contacts requirements from the Due Process Clause. The Court held in *Quill* that it would not overturn the bright line physical presence test that was established by the Supreme Court in *Bella Hess*[45] for sales and use taxes.[46] Although created by the Court in *Quill*, lower courts have had difficulty applying the distinction between minimum contacts and substantial nexus. Courts have struggled to determine if the physical presence test that distinguishes the minimum contacts standard from the substantial nexus standard is only applicable to sales and use tax or all taxes.[47]

The second prong of the *Complete Auto* test states that the tax must

39. *Quill*, 504 U.S. at 309.

40. 430 U.S. 274 (1977).

41. *Id.* at 275-76.

42. *Id.*

43. *Id.* at 288-89.

44. *Id.* at 279.

45. 386 U.S. 753 (1967).

46. Quill v. North Dakota, 504 U.S. 298, 309 (1992).

47. *See* Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W. Va. 2006); J.C. Penney Nat'l Bank v. Johnson, 19 S.W.3d 831 (Tenn. Ct. App. 1999).

be fairly apportioned.[48] This means that a state may not enforce a tax against a taxpayer that is not in relation to the amount of work done in that state. In *Zelinsky v. Tax Appeals Tribunal of the State of New York*,[49] the New York Court of Appeals held that a New York state tax on the entirety of a law professor's salary was neither a violation of the Due Process Clause nor the Commerce Clause.[50] The taxpayer in this case challenged only the second prong of the *Complete Auto* test, arguing that the tax was not fairly apportioned. The taxpayer, a nonresident, argued that the tax should be attributed to New York based on only the amount of days he commuted to New York.[51]

New York, on the other hand, apportioned the tax based on "the convenience of the employer" test. This test apportions income to the state based on the amount of days worked in New York divided by the total amount of days worked in the year. However, under New York's apportionment, days of work attributed to another state besides New York may only be attributed if the work outside the state is a necessity, not merely a convenience.[52] Therefore, under this test, the days worked by a law professor from his home in New Jersey were counted as days of work in New York.[53] The professor's job was in New York, and the only reason he was not working in New York was because it was more convenient for him to work from home instead of his office at the law school.[54]

The court upheld the tax based on apportionment by the convenience of the employer test because it was both internally and externally consistent.[55] Internal consistency exists if double taxation would not otherwise exist if every state applied the same tax.[56] The court found that if every state used the convenience of employer test, then only New York would have a right to the taxation of the professor's income.[57] Therefore, the tax was internally consistent. External consistency exists when the state's justification for taxation is attributable to economic activity within the state.[58] When a state has chosen an apportionment method, it is the burden of the taxpayer to show that the tax has been grossly distorted. The court found that the professor's work at home

48. Complete Auto Transit, Inc. v. Brady, 430 U.S. 259, 279 (1977).
49. 801 N.E.2d 840 (N.Y. 2003).
50. *Id.* at 845.
51. *Id.* at 844.
52. *Id.* at 845.
53. *Id.*
54. *Zelinsky*, 801 N.E.2d at 843.
55. *Id.* at 845.
56. *Id.*
57. *Id.*
58. *Id.*

was auxiliary to his work in New York.[59] His work at home was for his employment in New York. Simply because he chose to cross state lines did not make him an interstate actor.[60] Because the taxpayer could not show a lack of external consistency, the court ruled that the tax was externally consistent.[61] The Court held that because the tax was both internally and externally consistent, it was fairly apportioned, and therefore passed the second prong of the *Complete Auto* test.[62]

The third prong of *Complete Auto* requires that the tax not discriminate against interstate commerce.[63] This means that a state tax may not discriminate against nonresident activity in the state by creating a tax that unduly burdens interstate commerce. The Supreme Court held in *American Trucking Ass'ns, Inc. v. Scheiner*[64] that a tax was unconstitutional because it violated the third prong of the *Complete Auto* test. *Scheiner* involved a Pennsylvania tax applied on truckers for the operation of trucks in the state.[65] The tax was a flat fee that did not differentiate between truckers simply passing through Pennsylvania and those traveling exclusively in the state.[66] The Court held that the tax was unconstitutional under the Commerce Clause because it did not pass the internal consistency test.[67] Internal consistency for the third prong requires that if all states adopt the same tax, interstate commerce will not be unduly burdened.[68] But here, the Court concluded if all states adopted the same tax as Pennsylvania, then interstate commerce, vis-à-vis truckers traveling cross country, would be unduly burdened. In order for a state tax to pass the internal consistency test, it must be able to be applied by all states and not have "impermissible interference with free trade."[69]

The fourth and final prong of the *Complete Auto* test requires a tax to be fairly related to the services provided by the state.[70] This prong was analyzed by the Supreme Court in *Commonwealth Edison Co. v. Montana*.[71] Montana had levied a severance tax on companies that were extracting coal from Montana, and the taxpayer argued that the tax was

59. *Zelinsky*, 801 N.E.2d at 847.

60. *Id.*

61. *Id.* at 849.

62. *Id.*

63. Complete Auto Transit, Inc. v. Brady, 430 U.S. 259 (1977).

64. 483 U.S. 266 (1987).

65. *Id.* at 270.

66. *Id.* at 271.

67. *Id.* at 284.

68. *Id.*

69. *Id.* (quoting Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984) (internal quotations omitted)).

70. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

71. 453 U.S. 609 (1981).

not fairly related to coal mining.[72] The taxpayer argued that because the tax affected primarily corporations formed outside of Montana, and because the tax was taxed at a higher rate than other industries, the tax violated the constitution.[73] The Supreme Court disagreed with this conclusion and held that "the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes."[74] The Commerce Clause does not prohibit a taxpayer engaged in interstate commerce from paying a tax on their just share of state tax burden. The Court finally looked at the measure in which the taxpayer was being taxed. The Court held that because the taxpayer was being taxed in proportion to the amount of coal they were removing from the state, it was reasonably related to the activity in the state.

C. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides, in part, "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the law."[75] Applying the Equal Protection Clause to state taxation, the Supreme Court has held that as long as a tax has a rational basis, the tax does not violate the Equal Protection Clause.[76]

Determining whether a tax violated the Equal Protection Clause was the central issue decided by the Supreme Court in *Armour v. City of Indianapolis*. Indiana levied a tax on property owners for the cost of a sewer improvement project. The taxpayers could pay the tax in a single lump sum or over time in installment payments. In 2004, property owners were given notice of the payment, but the tax was abandoned in 2005. The group of taxpayers that paid in lump sum were not refunded their payments, but those that chose to pay in installments were forgiven of all future payments. The group that paid in lump sum challenged the tax under the Equal Protection Clause.

In *Armour*, the Supreme Court held that the tax statute did not violate the Equal Protection Clause.[77] The Court found that the classification of the taxpayers was not based on a fundamental right or suspect classification, and therefore, the case fell into the prior precedent that

72. *Id.* at 612.

73. *Id.* at 613, 617-18.

74. *Id.* at 623 (citing Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937)).

75. U.S. CONST. amend. XIV, §1.

76. Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012).

77. *Id.* at 2080-81.

held the tax was constitutional if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."[78]

IV. FEDERAL AND STATE CASES AND FTA REPORT

The Federation of Tax Administration created a task force on nonresident income tax issues and submitted a report for recommendations[79] because of the increasing number of states that had begun to tax nonresident professional sports team members.[80] The task force partially attributed the increase in taxation of athletes to "the visibility of team members, the relative ease with which their time in the state and their employer can be identified, and team member salary levels relative to the population as a whole."[81] The task force saw compliance costs for the taxpayer and enforcement costs for administrations as the primary concerns of taxing professional athletes.[82]

The task force reviewed four options for taxation of professional athletes and recommended a uniform apportionment formula based on the duty days of the athlete. The alternative options were the home state apportionment model, the base state model, and the partnership model. In the home state apportionment, the taxpayer would attribute his income to the state in which the home games were played.[83] In the base state model, the tax return would be filed only with the state where the team was domiciled, and the state would be responsible for dividing the relevant information and funds to all other states involved. In the partnership model the "tax return filing responsibilities would be satisfied through a composite or consolidated return filed on behalf of all eligible team members.[84]

The task force recommended that the states adopt a uniform method of apportionment.[85] A uniform approach would remove compliance

78. *Id.* at 2080 (citing Nordlinger v. Hahn, 505 U.S. 1 (1992).

79. James W. Wetzler, *State Income Taxation of Nonresident Professional Team Athletes: A Uniform Approach*, J. OF FED'N OF TAX ADMIN. (1994).

80. *Id.* at 1.

81. *Id.*

82. *Id.* at 1-2.

83. *Id.* at n.9. This concept had considerable interest, but was found to be unconstitutional as it would, "obligate the home state to require a nonresident to include in the tax base income derived from services performed outside the state."

84. Wetzler, *supra* note 79, at 2.

85. *Id.*

burdens on taxpayers, as well as increase the likelihood of effective collection.[86] The details of the recommendation were that apportionment of income would be based on "the proportion of duty days spent in the state compared to the duty says spent in all states"[87] and that the tax returns would be filed either through simplified withholdings[88] or composite returns.[89]

Even before the task force was assembled and gave its recommendation, courts had examined the methods of personal income tax apportionment for professional athletes. In *Stemkowski v. Commissioner*,[90] the United States Second Circuit Court of Appeals looked at the games played method of tax allocation. The Treasury regulations regarding federal tax interpretations state that income shall be attributable to sources in the United States on a time basis.[91] Stemkowski was a player in the National Hockey League for the New York Rangers.[92] As a nonresident alien, Stemkowski was taxable on his personal income that he earned, but only income attributable to the United States.[93] The court was to determine if Stemkowski or the tax commissioner applied a functional apportionment to Stemkowski's income earned in the United States.[94]

Stemkowski argued that his tax obligation to the United States should be in proportion to the days he performed his duties in the United States, used as the nominator, and the total number of days in a year, used as the denominator.[95] The rationale behind using all the days in the year as the denominator in order to determine the percentage of days taxable to the United States was that, even in the off-season, Stemkowski was performing his contractual obligation to appear at training camp in good condition and, therefore, every day of the year he was contractually obligated to perform.[96]

The tax administrator argued, and the tax court agreed, that the plain language of Stemkowski's contract's suggested that Stemkowski was

86. *Id.* at 2-3.

87. *Id.* at 3.

88. The professional teams would be required to withhold tax for each team member in each taxing state.

89. "[A] composite tax return by the team on behalf of each nonresident team member in each taxing state in which the team played games or services were performed." Wetzler, *supra* note 79, at 5-4.

90. 690 F.2d 40 (2d Cir. 1982).

91. 26 C.F.R. § 1.861-4(b) (1975).

92. *Stemkowski*, 690 F.2d at 42.

93. *Id.*

94. *Id.*

95. *Id.* at 44-45.

96. *Id.* at 45.

paid only to play in the NHL games, not stay in shape.[97] This was due to the fact that a clause in the contract stated that a portion of his salary would be forfeited equal to the ratio of the number of days of the suspension to the total number of days scheduled with games.[98] Because Stemkowski was paid only to play the games, the proportion of his salary that should be allocated to the United States should be in proportion to the amount of games played in the United States divided by the total number of games played, or the games played method of allocation.

The Second Circuit rejected both analyses and overturned the tax court's decision.[99] The court held that the tax court's findings were clearly erroneous because there might have been other reasons the contract used this formula to reduce salary other than paying players only for the games they played in.[100] Moreover, the court found that because the contract also fined players for failing to participate in exhibition games and training camp, the plain language of the contract suggested that the players were obligated to perform in more than just league scheduled games.[101] But the court also found flaws in Stemkowski's rationale that the off-season should be counted as an obligated performance day, holding that "fitness is not a service performed in fulfillment of the contract but a condition of employment."[102]

Thus, the court rejected both the holding by the tax court and Stemkowski's recommendation. Instead, the court held that Stemokowski was obligated to perform on all days during training camp, the regular season, and playoff games. Days during the off-season were not included by the court as days Stemkowski was obligated to perform. Stemkowski was obligated to apportion his salary in proportion to the amount of duty days he worked in the United States by the amount of total duty days that were in the year, otherwise known as the "duty days method." The final apportionment of personal income to be taxed as United States source income for Stemkowski was 187 duty days' work[103] divided by 234 total duty days.[104]

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97. *Stemkowski*, 690 F.2d at 45.

98. *Id.*

99. *Id.*

100. *Id.* The court noted it was administratively easier to deduct salaries this way, and it was a way for the teams to maximize the salary penalty per day lost.

101. *Id.* at 46.

102. *See also* Favell v. United States, 16 Cl. Ct. 700 (Cl. Ct. 1989). *Favell* involved a nonresident alien hockey player, and the United States Court of Federal Claims noted that "professional athletes, like members of all professions, are expected to maintain a minimum level of ability to perform, or else risk losing their positions." *Id.* at 73-74.

103. *Stemkowski*, 690 F.2d at 45 (equaling 164 days of regular season plus 23 days of playoff

Just as the federal court in *Stemkowski* decided the issue of apportionment for a nonresident alien attributing days within the United States, state courts have grappled with similar issues of apportioning nonresident athletes' income to days of performance within their own states. California has dealt with the issue for both athletes and entertainers. In *In re Carrol*,[105] the State Board of Equalization ruled on the tax obligations of Joseph Carrol, a nonresident of California who played for the Golden State Warriors between 1980 and 1982.[106] Carrol argued that the only days that should be apportioned to California should be in equal proportion to the amount of games played in California, equal to fifty-three and fifty percent in the 1980-1981 and 1981-1982 seasons, respectively.[107] The state argued that Carrol was not only required to play in games, but was also required to participate in team practices, training camp, and team travel. Therefore, by adding in the duty days attributed to those activities, Carrol's apportioned income attributed to California seventy-three percent in the 1980-1981 seasons and seventy percent in the 1981-1982 season.[108]

Because Carrol was a nonresident, he was responsible for apportioning only the amount of his salary as income attributable to California that was received for personal services performed within the state.[109] The Board concluded that because athletes are paid for practicing and traveling with the team and fined if they fail to do so, the working day includes all practices, training sessions, and games played.[110]

The New York Division of Tax Appeals ruled in favor of the duty days approach in *In re Bickett*.[111] Here, the nonresident professional football player apportioned his income by the duty days method, while the Division of Taxation argued that the taxpayer's income should be taxed on the games played method of allocation.[112] The court ruled that the taxpayer had correctly allocated his income under the duty days rule because, "the efforts required to earn that income certainly include practice on practice days as required by the contract."[113]

hockey in the United States).

104. *Id.* (totaling 27 days of training camp, 179 days of regular season, and 28 days of playoff hockey).

105. No. 85A-684-SW, 1987 WL 50144 (Cal. St. Bd. Eq. Apr. 7, 1987).

106. *Id.* at *1.

107. *Id.*

108. *Id.*

109. *Id.* at *2.

110. *Carroll*, 1987 WL 50144, at *2.

111. No. 813160, 1996 WL 54179 (N.Y. Div. T.A. Feb. 1, 1996).

112. *Id.* at *1.

113. *Id.* at *3.

V. *HILLENMEYER* AND *SATURDAY*

The Ohio Supreme Court has decided two cases brought by former NFL players alleging that they were taxed in violation of the United States and Ohio Constitutions.[114] Hunter Hillenmeyer, a former linebacker for the Chicago Bears, and Jeff Saturday, a former center for the Indianapolis Colts, were taxed on 1/20th of their income by the City of Cleveland for their teams' participation in an NFL game played in Cleveland. Neither is a resident of Cleveland, Ohio.[115]

Both parties challenged Cleveland's tax claiming that the 1/20th apportionment violates the United States Constitution.[116] The city had used the games played method to apportion the amount of tax owed by athletes playing in Cleveland. Cleveland's tax administrative authority provided and enforced regulations that required athletes to allocate income based on the games played method of allocation.[117] 1/20th of each player's annual salary was therefore attributed to have been earned in the city of Cleveland. The numerator of the apportionment was the amount of games played in Cleveland, and the denominator is the games that their teams played in a year.[118] The players argued that the regulation was an unfair apportionment of their salary because they are contractually obligated to work more than just on game days. Instead, the players suggested that their taxation should be based on "duty days," increasing the denominator to include all days that the players are obligated to perform services for their employers. Hillenmeyer argued that his taxable income in Cleveland should be reduced from 5% (1/20) to 1.27%[119] in 2004, 1.21% in 2005[120], and 1.19%[121] in 2006.[122] Saturday's case had even larger tax implications. Saturday was injured in 2008 and did not travel with the team to Cleveland. Therefore, under the duty days method of apportionment, Saturday argued that he should not be taxed for any services performed in Cleveland because he was not contractually obligated to perform in Cleveland.[123]

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114. Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164 (Ohio 2015); Saturday v. Cleveland Bd. of Review, 33 N.E.3d 46 (Ohio 2015).

115. *Hillenmeyer*, 41 N.E.3d at 170; *Saturday*, 33 N.E.3d at 47.

116. *Hillenmeyer*, 41 N.E.3d at 166-67; *Saturday*, 33 N.E.3d at 47.

117. *Id.* at 170 ("Cleveland imposes a 2 percent tax on the income that is allocable to Cleveland. *See* Cleveland Codified Ordinances 191.0501. CCA Regulation 8:02(E)(6) sets forth a games-played method to allocate the income of a nonresident professional athlete such as Hillenmeyer.").

118. Including the sixteen regular season games, plus the four pre-season games.

119. Hillenmeyer performed services in Cleveland for 2 out of 157 duty days.

120. Hillenmeyer performed services in Cleveland for 2 out of 165 duty days.

121. Hillenmeyer performed services in Cleveland for 2 out of 168 duty days.

122. *Hillenmeyer*, 41 N.E.3d 170.

123. Brief of the Appellant Jeffrey B. Saturday and Karen R. Saturday at 1, 14, Saturday v.

Beyond unfair allocation of income, the plaintiffs in the Ohio cases also argued that a statute, Ohio Revised Code 718.011(B), discriminated against their profession and therefore violated the Equal Protection Clause of the United States Constitution.[124] In Ohio, nonresidents are not responsible for Ohio income tax unless they perform services in the state for at least twelve days. At the time the case was argued, Ohio Revised Code 718.011(B) made an exception to this rule and taxed athletes and entertainers on any services performed within the state, regardless of whether or not they performed services in the state for at least twelve days.[125] Hillenmeyer and Saturday argued that these statutes treat professional athletes differently from other similarly situated taxpayers and therefore is a violation of the Equal Protection Clause of the Constitution.[126]

This special Ohio personal income tax does not only affect National Football League players in Ohio and Cleveland, but all athletes in all sports. Hillenmeyer's and Saturday's cases were supported by an amicus brief written jointly by the National Football League Players Association, the Major League Baseball Players Association, the National Hockey League Players Association, and National Basketball League Players Association.[127] The brief first argues that athletes are unfairly singled out from other high paying service industries without a proper justification.[128] The brief continues to argue that although athletes may have a larger salary than many other professions, they should not be singled out solely for this, because their profession is more dangerous in nature than other professions, resulting in the average careers being much shorter than any other profession.[129]

The Ohio Supreme Court made its decision, and ruled against the games played method of apportionment, but upheld Ohio Revised Code 718.011(B).[130] The court ruled that the games played method did violate the Due Process Clause of the United States Constitution because "it foreseeably imposes Cleveland income tax on compensation earned

Cleveland Bd. of Review, 33 N.E.3d 46 (Ohio 2015) (No. 14-0292).

124. *Hillenmeyer*, 41 N.E.3d 172; Brief of the Appellant Jeffrey B. Saturday, *supra* note 123, at 47.

125 Effective January 1, 2016, Ohio Revised Code §718 was revised changing twelve days to twenty days.

126. Brief of the Appellant B. Jeffrey Saturday, *supra* note 123, at 47; Brief of Appellant Hunter T. Hillenmeyer at 34, Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164 (Ohio 2015) (No. 14-0235).

127. Brief of Amicus Curiae National Football League Players Association, et al., *Hillenmeyer v. Cleveland Bd. of Review*, 41 N.E.3d 1164 (Ohio 2015) (No. 14-0235).

128. *Id.* at 2.

129. *Id.* at 5 ("In the NFL, for example, the average length of a player's career is about three and one-half years.")

130. Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164, 1177 (Ohio 2015).

while . . . working outside Cleveland."[131] The court did not reach the athlete's Commerce Clause arguments because the court ruled that the Due Process Clause argument was dispositive on the issue.[132] The court followed its ruling from a previous case relating to whether an athlete is compensated only for the games the athlete plays in the year or is compensated based on the "duty days."[133] The court said that the "duty days" method did correctly allocate the correct amount of income to the state and city.

The athletes were not able to escape the state and local taxes completely. The court ruled that the statute that singled out athletes and performers did not violate the Equal Protection Clause.[134] The court reasoned that there was no Constitutional violation because "professional athletes are typically highly paid, and their work is easy to find, so that a city could earn significant revenue with comparative ease" together with the fact that "the legislature could rationally find that professional athletes and entertainers and their events incur much larger public burdens relating to police protection and traffic and crowd control, among other public services, than do other occasional entrants."135

Other state and federal courts have previously ruled that the allocating income according to duty days is more rational to the amount of work performed in a state than the games played method. The *Hillenmeyer* and *Saturday* cases highlight these arguments. The Ohio cases were slightly different from previous cases in that the state and local legislative bodies empowered an executive agency to create and enforce regulations to determine proper allocation of income. The court did not just rule that the duty days method was more rational than the games played method, but ruled that the games played method was not Constitutional.

VI. IS THE GAMES PLAYED METHOD OF TAXING PROFESSIONAL ATHLETES CONSTITUTIONAL?

The games played method of apportionment for personal income of athletes has not been popular among legislative bodies or courts. However, with states and localities becoming more aggressive in tax collection, it would not be unexpected for them to switch to the games played method of apportioning personal income for professional athletes

131. *Id.* at 1177 (Ohio 2015).
132. *Id.* at 1778.
133. *Id.* at 1777 (citing Hume v. Limbach, 575 N.E.2d 150 (Ohio 1991)).
134. *Id.* at 1773.
135. *Hillenmeyer*, 41 N.E.3d at 1773.

in the future if they believed the statute could be upheld. Regardless, the question remains: Is the games played method constitutional? This was the issue brought up in the *Hillenmeyer* and *Saturday* cases when the city of Cleveland levied a tax on their income according to the games played method. Other federal and state courts have assessed the argument between the games played and duty days methods of apportionment, but they have only considered which method more fairly represented how income should be allocated within a state. The Ohio Supreme Court made the ruling that the games played method of allocating income was in violation of the United States Constitution. This section will analyze whether the Ohio Supreme Court's decision was correct, and whether legislatures that in the future impose a tax on athletes according to the games played method would have Constitutional justification.

A. Due Process Consideration for the Games Play Method of Apportionment

The two main Due Process issues in relation to state taxation are: (1) The Due Process Clause requires a state to establish that a taxpayer has minimum contacts with a state and (2) a tax on personal income must be "rationally related to values connected with the taxing State."[136] An athlete that is paid for services performed in the state and enters a state to perform such services has established minimum contact with that state. The taxpayer has personally availed himself to the state by entering it and has come to enjoy the benefits and protections of the state. The facts behind the *Saturday* case raise an interesting issue of whether a professional athlete who does not travel with the team, and does not enter the state, has established minimum contacts with that state. The Supreme Court has said that minimum contacts are established by "some definite link, some minimum contact between a state and the person, property or transaction it seeks to tax."[137] A professional athlete may argue that he or she should not be subjected to a state's taxation if he or she did not enter the state to perform any services. But this argument does not look at the transaction that is being taxed. A professional athlete's salary can be fairly attributed to the games that are played in a season. This is the service that the athlete is providing for his team. An athlete is also paid this amount if the player's team performs without the player. Although Saturday did not personally play in the game, his salary is based on the game being

136. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272-73 (1978).
137. *Id.*

played, and the state has made that game being played possible. As discussed in Part I, the cost to a municipality exceeds just the cost that the public pays for the stadium. The cost to a municipality to provide a stadium for these players to be able to perform their service also includes the infrastructure costs and municipal services that are required for each game to be played. Because the transaction between the player's service and the team is made possible only by the benefits provided by the state, Ohio and Cleveland have a rational basis to tax the transaction between a player and his team when the player's team enters the Ohio to play a game.

Athletes will object to the games played method of allocation, especially when the method is not the majority position. The negative effect a minority method of allocation will have on athletes can be displayed using a hypothetical. If an athlete is taxed in his home state using the duty days method, he would be taxed on more than half of his income.[138] If all away games that the athlete was contracted to perform in took place in states levying taxes on out of state players using the games played method of apportionment, then the athlete would be taxed on half of his income by those states.[139] This hypothetical would subject the athlete to state taxation on over 100% of his income. But as the Supreme Court has said, the possible occurrence of double taxation alone is not enough to make a tax be in violation of the Due Process Clause.[140]

The Supreme Court has made the ruling that a tax levied will not be in violation of the Due Process Clause if the "state has adopted a method not intrinsically arbitrary."[141] No argument by a taxpayer suggests that the games played method of apportionment is intrinsically arbitrary. Other courts have ruled that the duty days method is more rational according to the way that the contract is written. But those courts have not suggested that a statute authorizing a games played method of apportionment would be so incomprehensible that any statute promoting the games played method of apportionment should be overturned. Professional athletes are paid for their services performed in games. Other activities, such as practices and meetings, are auxiliary to this main event, and taxing athletes on the primary events pertaining to the services they provide is rational. The games played method of

138. This is making the assumption that half of the athlete's games are played in the home state, and practices and other team meetings that the player is obligated by his contract to perform are also performed in the same state.

139. Making the assumption that half the scheduled games are played at home in the athlete's home state, and half the scheduled games are played in a visitor's stadium.

140. *See* Curry v. McCanless, 307 U.S. 357, 367-68 (1939); Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938)).

141. Hans Rees' Sons, Inc. v. N.C. *ex rel* Maxwell, 283 U.S. 123, 133 (1931)).

apportionment is not the only coherent way of apportionment of a player's salary, but it is one rational method of apportionment and a statute authorizing its use should not be overruled by a court from Due Process consideration.

B. Commerce Clause Consideration for the Games Play Method of Apportionment

An analysis of the games played method of apportionment in light of the Commerce Clause requires an examination of the four *Complete Auto* prongs. For a state to levy a tax using the games played method of apportionment, the tax must: (1) have substantial nexus; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state.[142]

The Supreme Court has held that the substantial nexus requirement is a different standard from the minimum contacts standard for sales and use tax. A physical presence test was the test upheld in *Quill* for a state to have minimum contacts with a state. Although an argument could be made that a physical presence test is the standard for substantial nexus for all state and local taxes, it seems unlikely in the personal income taxation context. *Quill*'s holding was decided partly through the doctrines of stare decisis and detrimental reliance.[143] Contrastingly, no case has been decided by the Supreme Court using the physical presence test for personal income taxation, making stare decisis and detrimental reliance irrelevant. Lower courts have read *Quill* narrowly, applying the holding from *Quill* only to sales and use tax.[144] To the point that athletes would have a difficult argument proving they do not have a substantial nexus with a state, Brent Hillenmeyer did not challenge the constitutionality of the games played method of apportionment under the first prong of *Complete Auto* in his merit brief.[145]

The next prong of *Complete Auto* requires a tax to be fairly apportioned to the activity conducted in the state. The games played method of apportionment must be both internally and externally consistent. The games played method of apportionment is internally consistent, because if every state applied the method, there would not be double taxation on an athlete's income. A state would be justified in apportioning the amount of income in proportion to the amount of games played in the state by the total amount of games played. The games played method draws a bright-line on what can be apportioned to

142. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

143. The mail in order industry had relied on the physical presence test for over twenty years.

144. *See* Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W. Va. 2006).

145. Brief of Appellant Hunter T. Hillenmeyer, *supra* note 126, at 31.

a state and would not result in double taxation.

The games played method is also externally consistent. A tax is externally consistent when the state's justification for taxation is attributable to the economic activity within the state. The burden is on the taxpayer to show that the tax has been grossly distorted. Arguments on this issue are similar to those for apportionment discussed for due process. Because the games played method is one rational method of apportioning income, the taxpayer would not be able to argue that the tax was grossly distorted and, therefore, the athletes cannot argue that the tax was externally inconsistent.

To pass the third prong of the *Complete Auto* test, the games played method must not discriminate against interstate commerce. This method of apportionment applies to both resident and nonresident athletes that perform their services in the state and, therefore, it does not facially discriminate against nonresident taxpayers. Furthermore, the games played method, if adopted by all states, would not unduly burden interstate commerce. As the internal consistency test of the second prong showed, a taxpayer would not be subject to double taxation if used by all states, but would be subject to personal income tax on his whole salary, divided proportionally among the states in which he played. Thus, the third prong of the test would also pass Constitutional muster.

The final prong of the *Complete Auto* test requires the games played method of apportionment to be fairly related to the services provided by the state. The Supreme Court has held that for a tax to be fairly related to the state, the constitutional bar only requires that "the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes."[146] As mentioned in Part I, the costs to cities and states for providing arenas for athletes to perform in is a significant burden to bear. Not only is the cost of the structure and land shouldered mostly by public finance, but cities and states also are often responsible for paying the ongoing costs of operations, including an increase in municipal services. Athletes directly benefit from the public providing these stadiums and operational costs. Furthermore, as the out of state coal companies benefitted in *Commonwealth Edison*, athletes also benefit from entering a state being able to perform services in a living society, with all the normal protections provided by the state.

A counter-argument that athletes might assert is that being taxed on their income is not fairly related to the services provided by the state

146. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937).

because athletes are not the only group of people directly benefitting from the services provided by the state. It is true that the owners of sports franchises, as well as the fans that participate in sporting events, also benefit from the services provided by the state. But this fact has little to do with whether a tax on professional athletes is fairly apportioned to their income. What matters is whether the measure of the tax is proportional to the services provided by the state.

Like the other prongs of the *Complete Auto* test, the measure of the tax being fairly apportioned relies heavily on whether the games played method is a rational method of apportionment. As stated previously, the games played method is one rational method of apportionment. An athlete in the NFL receives income from the games in which his team is scheduled to play. That athlete derives benefits from each state that is providing services to make those games possible. Like the severance tax in *Commonwealth Edison*, the games played method is in proportion to the amount of use the taxpayer has in the state and, therefore, is reasonably related to the activity in the state.

VII. EQUAL PROTECTION CONSIDERATION FOR THE STATE AND LOCAL STATUTES THAT DISCRIMINATE AGAINST PROFESSIONAL ATHLETES AND ENTERTAINERS

Ohio is one of several states with a statutory provision setting a different standard for athletes than the rest of the tax base in terms of the required time to be in a state to be responsible for paying taxes on personal income.[147] Athletes may argue that this is a violation of the Equal Protection Clause.

The first step of determining whether the Equal Protection Clause has been violated is to determine the standard of review. Athletes are not a classification based on a fundamental right, thus the tax on such a class will be reviewed on a rational basis. As the Supreme Court stated in *Armour*, a tax under rational review will be constitutional if there is plausible policy reason for the classification, the facts surrounding the classification are true, and the relationship between the class and the state's goal is not so attenuated as to render the distinction arbitrary or irrational.

One plausible policy reason for the distinction between athletes and other taxpayers is the simplicity of the distinction. A tax on athletes based on games played in the state provides a small burden on the taxpayer in terms of compliance and is easily enforceable by the taxing

147. LEXISNEXIS, LEXIS MULTISTATE TAX CHARTS WITH ANALYSIS: PERSONAL INCOME TAX: TAXATION OF ATHLETES AND ENTERTAINERS (2014).

institutions. It is readily apparent for both the taxpayer and the enforcement agency where an athlete performs the service of playing in a game. Furthermore, another policy reason for distinguishing between athletes and other taxpayers is because the tax on athletes is directly connected with the costs on the public that enable them to perform their services. These policy considerations are not arbitrarily assigned and are more than enough to meet the relatively low rational basis threshold required by the Equal Protection Clause.

VIII. CONCLUSION

If a state and local tax is not in violation of a taxpayer's Constitutional rights then a court cannot reject the tax. Our federal system has given state legislatures the right to impose taxes that are not otherwise in violation of the Constitution. As discussed above, the games played method of apportionment and statutes that single out professional athletes are not in violation of the Constitution. Therefore, the court system is not the forum to institute change on these issues.

It is worth noting that when an athlete is subject to taxes on personal income in multiple states and by multiple localities, the cost of compliance increases. Unfortunately for the taxpayer, this is the result of a federal taxing system that gives jurisdictions the right to impose their own taxing statutes. However, the proper forum to address these issues is not through the courts, but through state or federal legislative bodies. As Justice Scalia wrote in the majority opinion of *Quill*, the decision to not overturn the state tax at issues was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."[148] If compliance with state taxation for athletes is a major concern, then Congress has the power and is in the position to make such a change. Furthermore, states are free to adopt a uniform approach to state taxation and to collectively adopt a uniform approach such as the one suggested by the Federal Tax Administration.

As states continually look to balance their budgets, aggressive enforcement and new statutes will be passed to increase the amount of revenue for the state. Professional athletes are among society's highest paid employees, and, because of their visibility, are potentially easy targets for states to collect taxes on their personal income. This Comment illustrates that both the games played method of apportioning player's income, as well as statutes that single out professional athletes, are constitutional. Current and future challenges of these issues cannot

148. Quill, v. North Dakota, 504 U.S. 298, 318 (1992).

be resolved in the courtroom, but must be made through legislative bodies.